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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SABINO ROBLES BANUELOS,

Defendant and Appellant.

B289578

(Los Angeles County
Super. Ct. No. BA205229)

APPEAL from an order of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Reversed.

Martin Lijtmaer for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Sabino Banuelos appeals from the denial of his motion pursuant to Penal Code section 1473.7¹ to vacate his conviction of possession of a deceptive identification document and a fraudulent public seal. He contends that prejudicial errors were made which damaged his ability to understand or defend against the adverse immigration consequences of his guilty plea. We conclude that the trial court applied the wrong standard in denying the motion, which was supported by the only evidence to be found in the record. We thus reverse with directions to the trial court to grant the motion and vacate the conviction.

BACKGROUND

In 2000, Banuelos pleaded no contest to possessing a fraudulent public seal (§ 472) and manufacturing a deceptive identification document (§ 483.5, subd. (a)). The superior court suspended his prison sentence and placed him on three years of formal probation with the condition that he spend 90 days in jail. In 2003, the convictions were redesignated as misdemeanors under section 17, subdivision (b), and sometime later were dismissed and set aside under section 1203.4.

In 2018, Banuelos moved to vacate the conviction of the original charges.

In support of the motion, Banuelos declared he came to the United States with his wife, Rosaura, in 2000. He came from a poor farming family in a tiny community and had little formal education. Banuelos found a construction job in Los Angeles, but after three or four months his employer threatened to fire him unless he obtained his “papers.” He contacted the friend of a

¹ All undesignated statutory references will be to the Penal Code.

friend to obtain the papers, but when he picked them up police arrested him. The district attorney charged him with possessing a fraudulent public seal and manufacturing or selling a deceptive identification document, and Banuelos's attorney negotiated a plea deal under which he would plead no contest to the charges and be sentenced to only 90 days in jail. However, the attorney never advised him of the consequences of such a plea.

Banuelos declared:

"I was completely confused and scared during the proceedings. Even though I remember there being an interpreter, I did not understand what was going on or how the system worked. I am a simple and uneducated person, and the court process did not make any sense to me. I also remember my public defender telling me that the charges were very serious and that I could spend years in prison.

"I remember the day I took a deal. My attorney told me that I had no choice but to take the deal. He said that I was guilty and that I was lucky to get a 90-day sentence for my crime and that I should take the deal. My attorney never asked me about my immigration status even though it was clear I was not American because I only speak Spanish. I never even realized it was important for my attorney to know my immigration status. He never explained to me that accepting the two charges would make me deportable and make it impossible for me to legalize here in the future. If I had known that the charges would result [in] an imminent deportation and would have precluded any defense to deportation, I would have chosen to fight the charges or try to negotiate a result that would not destroy my chances of staying in the United States. I had spent my whole life in poverty, so when I got a job and was able to make enough money

to support my wife and send money home, for the first time in my life I felt that I was on the right path. I wouldn't have given this up if I knew there was a chance for a result that would give me a chance to remain in the United States."

Banuelos served the sentence and completed his probation, after which he and his wife moved to Sacramento, where he worked in construction despite having suffered a serious back injury that continues to cause him chronic pain. After the move, Banuelos was involved in a serious traffic accident that left his two and a half year old son permanently disabled, and sometime later his second son was stricken with muscular dystrophy. Both sons require constant care. Banuelos continues to work in construction while Rosaura stays home to care for the boys.

Banuelos further supported his motion with letters from family and friends describing his and Rosaura's optimistic outlook on life and efforts to support his family.

Banuelos also offered the declaration of Ricardo Aguayo, an immigration attorney, who stated that under the circumstances, Banuelos, who has never legalized his immigration status, is currently engaged in proceedings before the United States Department of Citizenship and Immigration Services. He is subject to deportation because he entered the United States without permission, and is likely to be referred to immigration court for removal proceedings. He would normally be eligible for and likely to receive "Cancellation of Removal," which would then allow him to obtain a "green card," but because the charges of which he was convicted are considered under federal law to be crimes of moral turpitude, and because he suffered more than one conviction, he would not be granted relief.

The People file no response to Banuelos's motion, and at the hearing acceded to its being granted.

The trial court found that before making his plea in 2000, Banuelos had been advised by the trial court pursuant to section 1016.5 that "If you are not a citizen of the U.S., you are hereby admonished that conviction of the offenses for which you have been charged and pleading [*sic*] no contest to will result in deportation, exclusion from admission, and denial of naturalization[.] [¶] Do you understand that, Sir?" Banuelos replied, "Yes." The court further found that Banuelos "was truly looking at a potential of 3 to 6 years, and in order to alleviate himself from that, he chose to go ahead and enter into this plea and understood the ramifications of such."

Based on these findings, the trial court denied Banuelos's motion to vacate his convictions.

DISCUSSION

A. *Immigration Consequences of Banuelos's Plea*

Under the Immigration and Naturalization Act, any alien convicted of a crime involving moral turpitude is subject to mandatory permanent removal from the United States. (8 U.S.C. § 1227(a)(2).) Any crime involving fraud is considered to be one of moral turpitude. (*Planes v. Holder* (9th Cir. 2011) 652 F.3d 991.) Expungement under section 1203.4 has no effect on the immigration consequences of the conviction. (*People v. Martinez* (2013) 57 Cal.4th 555, 560.) "It is also probable that the reduction to a misdemeanor under Proposition 64 would also have no effect." (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1004.) "In immigration proceedings when a deportable conviction has been vacated by the state court, it nevertheless remains a deportable conviction if it was vacated *solely* for rehabilitative

reasons or to allow the convicted person to remain in this country. [Citation.] On the other hand, while ‘[a] conviction vacated for rehabilitative or immigration reasons remains valid for immigration purposes, . . . one vacated because of procedural or substantive infirmities does not.’” (*Id.* at p. 1005.)

B. *Section 1473.7*

“A person who is no longer in criminal custody . . . may file a motion to vacate a conviction . . . [¶] . . . [that] is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (§ 1473.7, subd. (a)(1).)²

The motion “shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody,” but “may be deemed untimely filed if it was not filed with reasonable diligence after . . . [¶] [t]he moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.” (§ 1473.7, subd. (b).)

“The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance

² Effective January 1, 2019, subdivision (a)(1) of section 1473.7 was amended to add the following: “A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.” (Stats. 2018, ch. 825, § 2.) The addition obviates some of the parties’ briefing in this case but is immaterial to our discussion.

of the evidence, the existence of any of the grounds for relief specified in subdivision (a).” (§ 1473.7, subd. (e)(1).)

C. *The Court’s and Defense Attorney’s Respective Duties With Respect to Immigration Issues*

Pursuant to section 1016.5, prior to accepting a plea of guilty or nolo contendere to any offense punishable as a crime under state law, the trial court must administer the following advisement to the defendant: “If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” (§ 1016.5, subd. (a).)

A defendant engaged in plea evaluation and negotiation also has the right to counsel. (*In re Resendiz* (2001) 25 Cal.4th 230, 240, abrogated on another ground as stated in *Padilla v. Kentucky* (2010) 559 U.S. 356.) “[T]he right to counsel ‘ “is the right to the *effective* assistance of counsel.” ’ ” (*Ibid.*) “ ‘[I]t is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain.’ [Citation.] Thus, whether or not the court faithfully delivers section 1016.5’s mandated advisements, ‘the defendant can be expected to rely on counsel’s independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.’ ” (*Ibid.*) “The existence of a state statute requiring courts to deliver a specified immigration advisement cannot deprive defendants of these federal constitutional rights.” [Citation.] Efforts to mine section 1016.5’s history for hints the Legislature meant that statute to foreclose some kinds of ineffectiveness claims [citation] are misplaced. . . . [T]hat a defendant may have

received valid section 1016.5 advisements from the court does not entail that he has received effective assistance of counsel in evaluating or responding to such advisements.” (*Id.* at p. 241.)

D. *Standard of Review*

When an order denying a motion to vacate a conviction is challenged on statutory grounds, our review is for abuse of discretion. (See *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.) “A trial court may be found to have abused its discretion . . . if its factual findings are not supported by substantial evidence or if it misinterprets or misapplies the applicable legal standard.” (*People v. Gonzalez* (Sept. 27, 2018, D073436) review den. and opn. ordered nonpub. Jan. 23, 2019.) When an appellant claims he was deprived of a constitutional right, i.e., the right to effective assistance of counsel, our review is de novo. (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76.)

E. *Application*

The facts established by Banuelos’s declaration showed that in 2000 his criminal counsel failed to help him evaluate the immigration consequences of accepting the offered plea deal, as the attorney never asked him about his immigration status or explained the consequences of pleading no contest to two felonies involving fraud. The trial court here made no express or implied credibility determination for or against Banuelos on this point, as the ruling was based upon the court’s conclusion that the section 1016.5 advisement obviated Banuelos’s attorney’s duty to advise him regarding the advisement. That the trial court in 2000 delivered the immigration advisement mandated by section 1016.5 did not mean Banuelos received effective assistance in evaluating or responding to the advisement.

Banuelos's declaration further showed that the error was prejudicial, as he would not have accepted the plea deal had he known it would likely result in his permanent deportation. Nothing in the record supports the trial court's contrary finding that he knowingly accepted the plea deal because he feared incarceration for three or six years.

We therefore conclude that Banuelos satisfied the required showing that an error prejudicially damaged his "ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of [his] plea of . . . nolo contendere," as required by section 1473.7, subdivision (a).

Respondent argues the trial court's advisement under section 1016.5 in 2000 obligated the trial court here to conclude Banuelos understood the immigration consequences of his plea. The argument is without merit.

A formulaic advisement under section 1016.5 is no substitute for an attorney's advice on the possible consequences of a plea. "[W]hile 'the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received . . . , this is not a substitute for advice by counsel. The court's warning, coming as it does just before the plea is taken, may not afford time for mature reflection.' " [Citation.] Similarly, section 1016.5, subdivision (b) itself provides that '[upon] request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section.' Both commentary and statute are concerned with the self-evident proposition that a defendant's in-court responses to rights advisements should not be made 'off the cuff.' Instead, they should reflect informed

decisions he has reached after meaningful consultation with his attorney.” (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1481.)

If a court advisement regarding immigration consequences of a criminal plea cannot substitute for the advice of counsel, it follows that assent to the advisement cannot foreclose a claim that the advisement was inadequately understood.

In an argument made for the first time on appeal, respondent contends Banuelos’s motion was properly vacated because he failed affirmatively to show he exercised reasonable diligence to bring the motion in a timely manner. The argument is without merit. Subdivision (b) of section 1473.7 provides that the motion “shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody.” Although the motion “may be” deemed untimely if not filed with due diligence (*ibid.*), the trial court here made no finding that the motion was untimely, and the People impliedly conceded it was timely. Nothing in section 1473.7 places a burden of production on a defendant to establish reasonable diligence absent any challenge to the timeliness of a motion to vacate a conviction.

DISPOSITION

The order denying Banuelos's motion to vacate his conviction is reversed and the matter is remanded to the superior court with instructions to grant the motion and to vacate the conviction.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.